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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. STEPHEN LINDAY JOHNSON, Defendant and Appellant.	B164591 (Los Angeles County Super. Ct. No. BA071592)

APPEAL from the judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed.

Lora Fox Martin, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Ellen Birnbaum Kehr, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Stephen Linday Johnson of corporal injury upon a spouse and assault. (Pen. Code, §§ 273.5, 240.) The trial court placed him on three years formal probation. Appealing from the judgment, he contends the trial court committed evidentiary and instructional errors. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2002, Cynthia D. was living with appellant, her husband. Their relationship was strained due to his drinking and substance abuse. On June 2, 2002, appellant had been drinking, which caused his behavior to alternate from being affectionate to being mean. In the early morning, appellant entered her bedroom and insisted upon having sex. Cynthia D. refused and attempted to roll away from appellant. He straddled her body and held her wrists. She screamed. Appellant put a pillow over her face and she could not breath. She broke free from appellant's grasp and began hitting and scratching him. She escaped to another room and waited. After two hours, she emerged, found appellant asleep in the living room, and went back to bed. She had bruises on her wrists and one arm, and her whole body ached from appellant's attack.

The following day, Cynthia D. went to stay with her daughter. Around June 5, 2002, a coworker photographed her bruises.[1] On June 6, 2002, she reported appellant to the Sheriff's Department because she was afraid of him. He had threatened to harm her dog and to take her house from her. She later obtained a restraining order against appellant and filed for divorce.

Appellant did not testify in his defense. A deputy sheriff testified he had taken the initial complaint from Cynthia D. on June 6, 2002. She told him about the assault, but declined medical attention. She also said a restraining order was unnecessary. Cynthia D. did not indicate appellant had threatened her.

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[1] On cross-examination, Cynthia D. acknowledged that she threw away the photographs of her wrists because they were of poor quality. Defense counsel impeached her with her preliminary hearing testimony that she was unaware of what happened to the photographs.

Appellant was charged by information with assault with intent to commit rape and corporal injury upon a spouse. The jury found him guilty of the lesser included offense of assault and corporal injury upon a spouse. Imposition of sentence was suspended and he was granted three years of formal probation on condition he serve 293 days in county jail.

DISCUSSION

1. Exclusion of evidence

Appellant claims the trial court erroneously excluded evidence of Cynthia D's accusations against her former husband to impeach her credibility. He further asserts the exclusion of the proffered evidence implicated his constitutional right to present a defense. His contentions are without merit.

During cross-examination, defense counsel asked Cynthia D. whether she was previously divorced. The court sustained the prosecutor's objection on the ground of relevance. At side bar, defense counsel explained he was attempting to show that Cynthia D. had fabricated her accusations of abuse against appellant. She made "essentially identical" accusations of drinking, threats and battery against Henry Downing, her former husband, when she filed for divorce. Defense counsel argued that because Cynthia D. makes false accusations to gain a financial advantage in divorce proceedings, he should be able to question her about her accusations against Henry Downing to impeach her credibility. Counsel initially maintained evidence of the accusations was admissible pursuant to Evidence Code section 1101, subdivision (b). He later sought to introduce them for purposes of impeachment.

The court determined Cynthia D.'s accusations against her former husband were not relevant. There was no indication they were false, nor were they sufficiently similar to her claims against appellant. In her first divorce, Cynthia D. alleged Henry Downing drank heavily and had a violent temper. In the instant case, she alleges appellant pinned her on the bed and tried to force her to submit to sexual intercourse. The court further found the divorce declaration was drafted 26 years ago. The court sustained the

prosecutor's objection and excluded the disputed evidence as neither relevant nor probative.

"[A]n appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) There was no abuse of discretion here. The evidence of Cynthia D.'s prior accusations is not relevant. First, there is no proof her accusations were fabricated, only argument by defense counsel, which is not enough. (See *People v. Alvarez, supra*, 14 Cal.4th 155, 201.) There was no attempt to establish their lack of truth through, for example, the testimony of her former husband. Second, the accusations only serve to show Cynthia D.'s predilection for selecting abusive husbands. While her choice of husbands may reflect poorly on her judgment, it has nothing to do with her credibility.

Even if her prior accusations were relevant, they were more prejudicial in making her look "bad" then probative of her lack of credibility. (See Evid. Code, § 352.) The accusations occurred 26 years ago, remote in time. Introducing them into evidence would also lead to an undue consumption of jury time, in that the court would have to conduct a kind of "mini trial" on the decades-old divorce. Courts are empowered "'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 301.) The evidence was properly excluded.

Nor was appellant denied the right to present a defense by disallowing the proffered evidence. Appellant was allowed to demonstrate weaknesses and inconsistencies in Cynthia D.'s testimony through cross-examination. He was also able to argue her claims against him were prompted by an ulterior motive. In any event, the proper application of evidentiary rules does not deprive a defendant of the opportunity to present a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 92.)

2. Jury Instructions

Appellant contends the trial court committed instructional error by advising the jury that voluntary intoxication was a defense to the crime of assault with intent to

commit rape, but not a defense to the crime of corporal injury to a spouse or the lesser crime of assault pursuant to CALJIC No. 4.21.1.[2] Relying on *People v. Reyes* (1997) 52 Cal.App.4th 975, appellant posits that voluntary intoxication is an affirmative defense to the crime of assault, and the jury should have been so instructed.[3] Specifically, appellant argues the jury should have allowed to consider evidence of his voluntary intoxication as

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[2] The jury was charged as follows: "In the crime charged in count 1, that's the assault with intent to commit rape, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime to which it relates is not committed. [¶] The specific intent required is included in the definition of the crime set forth elsewhere in these instructions. [¶] It is the general rule that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of that condition. [¶] Thus, in the crime of a corporal injury to spouse charged in count 2 or the crime of assault which is lesser thereto, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve the defendant of responsibility for the crime. This rule applies in this case only for the crime of corporal injury to spouse and the lesser crime of assault. [¶] However, there is an exception to this general rule, namely, where a specific intent is an essentially [*sic*] element of a crime. In that event, you should consider the defendant's voluntary intoxication in deciding whether the defendant possessed the required specific intent at the time of the commission of the alleged crime. [¶] Thus, in the crime of assault with intent to commit rape charged in count 1, a necessary element is the existence in the mind of the defendant of a certain specific intent which is included in the definition of the crime set forth elsewhere in these instructions. [¶] If the evidence shows that a defendant was intoxicated at the time of the alleged crime, you should consider that a fact in deciding whether or not the defendant had the required specific intent. [¶] If, from all the evidence you have a reasonable doubt whether the defendant had that specific intent, you must find the defendant did not have that specific intent." (CALJIC Nos. 3.30, 3.31, 4.20, 4.21.)

[3] The trial court also instructed the jury that proof of assault requires the elements of (1) willful commission of an act which by its nature would probably and directly result in the application of physical force upon another, (2) the intent to use physical force or the knowledge of facts leading a reasonable person to realize that "as a direct, natural and probable result of this act, that physical force would be applied to another person," and (3) the present ability to apply physical force to another person. (CALJIC No. 9.00 (2002 Revision).)

negating his awareness that "a direct, natural and probable result of his act" would be physical force applied to another person. Appellant is simply wrong.[4]

The California Supreme Court has repeatedly and recently reaffirmed that the offense of assault "is still a general intent crime [citation], and juries should not 'consider evidence of defendant's intoxication in determining whether [the defendant] committed assault.' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 788; see also *People v. Atkins* (2001) 25 Cal.4th 76, 91; *People v. Colantuono* (1994) 7 Cal.4th 206, 213-215; Pen. Code, § 22, subd. (a).) Under the doctrine of stare decisis the trial court was bound to follow the decisions of the California Supreme Court as is this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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ZELON, J.

We concur:

PERLUSS, P. J. WOODS, J.

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[4] Notwithstanding the People's claim, by failing to object to a jury instruction in the trial court appellant does not waive this issue on appeal. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.)